

LFC Requester:**Marty Daly**

**AGENCY BILL ANALYSIS
2016 REGULAR SESSION**

WITHIN 24 HOURS OF BILL POSTING, EMAIL ANALYSIS TO:

LFC@NMLEGIS.GOV

and

DFA@STATE.NM.US

{Include the bill no. in the email subject line, e.g., HB2, and only attach one bill analysis and related documentation per email message}

SECTION I: GENERAL INFORMATION

{Indicate if analysis is on an original bill, amendment, substitute or a correction of a previous bill}

Check all that apply:

Original X **Amendment**
Correction **Substitute**

Date 19 January 2016

Bill No: HB 80

Sponsor: Rep. Brian Egolf

Agency Code: 305 – Office of the Atty. General

Short

Person Writing Joseph M. Dworak

Title: State Ethics Commission Act

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SECTION II: FISCAL IMPACT

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY16	FY17		

(Parenthesis () Indicate Expenditure Decreases)

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY16	FY17	FY18		

(Parenthesis () Indicate Expenditure Decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY16	FY17	FY18	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total						

(Parenthesis () Indicate Expenditure Decreases)

Duplicates/Conflicts with/Companion to/Relates to: HJR5
Duplicates/Relates to Appropriation in the General Appropriation Act

SECTION III: NARRATIVE**BILL SUMMARY**

This analysis is neither a formal Attorney General's Opinion nor an Attorney General's Advisory Letter. This is a staff analysis in response to an agency's, committee's, or legislator's request.

Synopsis:

House Bill 80 proposes the creation of the State Ethics Commission Act (the "Act") and State Ethics Commission ("SEC"), and amends several other sections of state law related to the functions of the SEC. Sections 1 through 16 of HB 80 propose the enactment of the Act as new material, while Sections 17 through 62 of HB 80 amend current state law. Similar bills proposing the creating of a state ethics commission have been introduced over the past decade.

The Act creates an eleven member commission as an adjunct agency of the executive branch. The SEC would oversee the filing of complaints against state officials, state employees, government contractors, and lobbyists; as well as authority to promulgate an ethics code, provide annual ethics trainings, issue advisory opinions, and oversee arbitration of disputes regarding certain ethics laws.

The SEC would take over certain responsibilities currently delegated to the Secretary of State. Under HB 80, the SEC would be charged with administering the following state statutes:

1. Campaign Reporting Act
2. Voter Action Act
3. Lobbyist Regulation Act
4. Governmental Conduct Act
5. Financial Disclosure Act
6. Gift Act

The SEC would investigate complaints and hold hearings regarding allegations of ethics violations against public officers, public employees, candidates for elected office, government contractors, and lobbyists. The SEC would have rule promulgation authority and would also draft and submit proposed a code of ethics for each elected state official and state agency for adoption. The SEC could compile a substantive ethics guide and offer annual trainings to individuals subject to its jurisdiction and the public. The SEC would also assist with the issuance of advisory opinions and submit an annual report to the legislature and governor.

Proposals to amend current law are divided by the Sections within HB 80 as follows:

1. Sections 17 through 29 amend portions of the Campaign Reporting Act (NMSA 1978, §§ 1-19-25 to -36). Significant changes replace references to the secretary of state with the state ethics

commission.

2. Sections 30 through 43 amend portions of the Voter Action Act (NMSA 1978, §§ 1-19A-1 to -17). Significant changes replace references to the secretary of state and bureau of elections (a bureau in the SOS office) with the state ethics commission.
3. Sections 44 through 48 amend portions of the Lobbyist Regulation Act (NMSA 1978, §§ 2-11-1 to -9). Significant changes replace references to the secretary of state with the state ethics commission as well as cleaning up the current language of the statute.
4. Section 49 amends the Open Meetings Act (NMSA 1978, §§ 10-15-1 to -4). The only change is adding an enumerated exception under OMA for “meetings of the state ethics commission relating to complaints or investigations of alleged ethics violations.”
5. Sections 50 through 53 amend portions of the Governmental Conduct Act (NMSA 1978, §§ 10-16-1 to -18). Significant changes replace references to the secretary of state with the state ethics commission.
6. Sections 54 through 59 amend portions of the Financial Disclosure Act (NMSA 1978, §§ 10-16A-1 to -8). Significant changes replace references to the secretary of state with the state ethics commission.
7. Sections 60 through 61 amend portions of the Gift Act (NMSA 1978, §§ 10-16B-1 to -4). The only changes replace references to the secretary of state with the state ethics commission.
8. Section 62 transfers all functions and property of the secretary of state’s office used in the administration of the amended acts to the SEC. The section also transfers all contracts and references in law and rule related to the amended acts from the secretary of state to the SEC.
9. Section 65 provides an effective date of July 1, 2016, for several provisions related to the creation of the SEC, but provides an effective date of January 1, 2017, for the rest of the provisions, including all provisions changing all references in the affected statutes from the secretary of state to the SEC.

FISCAL IMPLICATIONS

State law impacted by this legislation include multiple references to the SEC’s authority, or in some cases obligation, to report alleged violations to the Office of the Attorney General for investigation and possible enforcement. HB 80 does not explicitly propose additional requirements on the Office of the Attorney General, but referrals made to the OAG may be affected if the state ethics commission increases or decreases the number and frequency of referrals compared to previous practices of the secretary of state.

It is unclear if the SEC executive director, who may also hire a general counsel (Section 6 C), would serve as legal counsel to the commission or if the Office of the Attorney General would represent the commission for legal advice and administrative appeals of commission adjudications. If the OAG would assist with legal counsel or representation for appellate matters it would implicate additional fiscal considerations, which would most likely involve attorneys and staff from Open Government and/or Litigation Divisions in Civil Affairs at the Office of the Attorney General.

HB 80 provides only for the transfer of certain “functions, appropriations, money, records, property, equipment and supplies” from the SOS to the new Ethics Commission (Section 62). It states nothing about providing new appropriations for the staff to be hired by the new Ethics Commission, the funds to pay the new Ethics Commissioners for the performance of their duties or the transfer of existing personnel from the SOS to the new Ethics Commission.

SIGNIFICANT ISSUES

It is reported that 42 other States have created independent Ethics Commissions.

HB 80 raises the issue whether the new Ethics Commission should focus, at least initially on strictly Ethics issues, as opposed to also assuming the administrative responsibilities currently lodged in the Secretary of State’s Office for the Campaign Reporting Act and other laws. It may be argued that the addition of those other responsibilities that the SOS currently administers would unnecessarily bog down the new Ethics Commission with matters that may not be core to the new central ethics laws oversight mission that is primarily intended.

HB 80 raises the issue whether the new State Ethics Commission (SEC) should be created as a matter of statutory law as proposed in HB 80 or whether the issue should be presented to the State’s voters first to consider adopting it as a constitutional amendment. If that passed, the Legislature would then be charged to adopt implementing legislation to provide details and funding for the new Ethics Commission.

Although HB 80 Section 49 adds an exception for SEC meetings to the Open Meetings Act (OMA), the exemption only provides that the SEC can hold closed meetings for matters “relating to complaints or investigations of alleged ethics violations.” It is important to note that this exception only applies to meetings of the SEC and not to any administrative hearing that may otherwise be subject to OMA. The amendment in HB 80 does not exempt the SEC from other OMA requirements, including public notice, agendas, minutes, or the general standard that any final decision of a public body must be taken on the record in open session during a properly noticed public meeting. Without further clarification or explicit exemptions, all SEC decisions, including those related to alleged ethics violations, are required by law to be voted on during a public meeting.

Furthermore, several of the processes referenced in HB 80 that would be transferred to the SEC include time requirements that may prove problematic for a public body that is required to satisfy OMA and provide public notice no less than 72 hours before each meeting. Time requirements imposed on the SEC should be considered closely to determine if it is practical for a public body requiring a quorum to meet the same obligations imposed on the secretary of state who did not have to comply with OMA when taking action and issuing determinations. (e.g. HB 80 Section 42 amends 1-19A-16(B)(2), which requires that the commission rule on an appeal within three days after the completion of the hearing. Scheduling meetings for commission action within such a short window of time may prove difficult).

PERFORMANCE IMPLICATIONS

It is unclear if the SEC executive director, who may also hire a general counsel (Section 6 C), would serve as legal counsel to the commission or if the Office of the Attorney General would represent the commission for legal advice and administrative appeals of commission adjudications.

Several sections of HB 80 address the referral of allegations to the Office of the Attorney General or the district attorney. Not every one of the referral procedures are the same, as the statutes differ between requiring referrals of alleged violations and allowing the SEC to use its discretion in referring alleged violations to the AG or appropriate DA. In addition to ensuring the SEC's referral obligations are clear, the SEC will need to determine a process for referrals (any action by the commission will need to take place in a noticed meeting).

ADMINISTRATIVE IMPLICATIONS

HB 80 amends the Lobbyist Regulation Act and prohibits any individual subject to the Lobbyist Regulation Act, Campaign Reporting Act, or Financial Disclosure Act from serving as an arbitrator for arbitrations conducted under the Lobbyist Regulations Act.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

House Joint Resolution 5, introduced by Representative Jim Dines, proposes an amendment to Article 5 of the New Mexico Constitution to create the state ethics commission upon being submitted to and approved by the public in the next general election. HJR 5 does have similar, but not identical, language regarding the composition (nine vs. 11 members) and charge of the commission, but it does not mandate the transfer of existing law functions from the SOS to the new Ethics Commission as proposed in HB 80.

TECHNICAL ISSUES

Director Qualifications: Section 5 (A)(9) of HB 80 provides that the SEC executive director "shall be an attorney" without further stipulations. Clarity regarding whether the director is required to be licensed in New Mexico or another jurisdiction, or any measurements of good standing may be helpful.

Prescribed Form: There may be ambiguity regarding the creation, distribution, and collection of "prescribed forms" through the different affected acts. Recommend reviewing all types of "prescribed forms" may be encompassed and verify the originating agency (seems to be SEC for all), who it is distributed by (page 32 in §1-19-28 states secretary of state or county clerk, but most if not all other references were changed to SEC), and who receives the filed copy (seems to be SEC for all). Also, consistent terms should be used (suggest replacing "prescribed reporting form" on page 32 with the defined term "prescribed form").

Proper Filing Officer: There may be ambiguity regarding the identity of the filing officer. HB 80 replaces a definition that includes the secretary of state or county clerk with "the state ethics commission as provided in Section 1-19-27 NMSA." Section 1-19-27 is within the Campaign Reporting Act. A subsequent reference to the proper filing officer is made in HB 80, referencing a completely different and very broad definition of "proper filing officer" in Section 1-8-25 of the state's election laws. Consideration should be given to whether all references to a proper filing officer as it pertains to HB 80 and the SEC can be consolidated and changed simply to the state ethics commission or if clarity can be added in another way.

OTHER SUBSTANTIVE ISSUES

ALTERNATIVES

1. Create the Ethics Commission by Constitutional Amendment rather than by statute, e.g. as proposed in HJR 5.
2. As an alternative to an 11-member Ethics Commission, would it be more effective to create a smaller member body?
3. Another alternative could be to create even a smaller membership, e.g., a three-member Commission (perhaps one from each of the State's three Congressional districts and, to fairly represent the State's voters, be composed of one Democrat, one Republican and one Independent or "Declined to State" voter).
4. If the new State Ethics Commission is to oversee the Executive and Legislative Branches of government, might it be more independent to provide that all of the Commissioners be appointed instead by a representative of the Judicial Branch of government?

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

Status quo.

AMENDMENTS